Supreme Court, U.S.
FILED

(1)

No. 98 1617 NOV 19 1999

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

GERALD W. EMERSON,

Petitioner,

V.

THE BOARD OF ZONING APPEALS
OF FAIRFAX COUNTY, AND
JANE W. GWINN, FAIRFAX
COUNTY ZONING ADMINISTRATOR,

Respondent(s).

On Petition for Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under Amendment XIV of the United States Constitution, a hearing by the Board of Zoning Appeals should have been continued to a date when the entire seven (7) member board could be present, rather than five (5) members, because of the statutory requirement that a decision for petitioner could only be by a full majority of the Board, i.e. four (4) members

LIST OF PARTIES

[X] All parties appear in the caption of this case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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THAT THE DENIAL OF A CONTINUANCE REQUESTED TO PROVIDE A FAIR CHANCE FOR APPELLANT TO GAIN THE VOTES OF FOUR (4) MEMBERS OF A SEVEN (7) MEMBER BOARD RISES TO A CONSTITUTIONAL DUE PROCESS DENIAL WHERE THE STATUS QUO HAS BEEN ONGOING FOR OVER FORTY

YEARS, THERE IS NO NUISANCE INVOLVED, AND THE DENIAL OF THE CONTINUANCE RESULTS IN APPELLANT HAVING TO GAIN THE VOTES OF FOUR OF THE FIVE BOARD MEMBERS PRESENT. THIS POINT IS UNDERSCORED BY THE FACT THAT APPELLANT GAINED THE VOTES OF THREE (3) OF THE FIVE (5) MEMBERS PRESENT.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

I. OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is unpublished.

II. JURISDICTION

The jurisdiction of this Court is invoked under the Fourteenth Amendment to the Constitution of the United States; and under Supreme Court Rule 10 (c), in that in this case a state court has decided an important question of federal constitutional law that has not been but should be settled by this Court, and in a way that conflicts with the principles set out in relevant decision of this Court.

The date on which the highest state court decided my case was August 21, 1998. A copy of that decision appears at Appendix .

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

AMENDMENT XIV Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIRGINIA CODE CITATIONS:

Virginia. Code Ann. §15.2-2312 (1997).

Procedure on appeal. – The board shall fix a reasonable time for the hearing of an application or

appeal, give public notice thereof as well as due notice to the parties in interest and make its decision within ninety days of the filing of the application or appeal. In exercising its powers the board may reverse or affirm, wholly or partly, or may modify, an order, requirement, decision or determination appealed from. The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance. The board shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records. The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. (1975,

c.521, § 15.1-496.2; 1983 c.444;; 1986, c. 483;

19997, c.587.)

STATUTES AND RULES

Rules of the Supreme Court of the United States

Part III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a). . .

(b). . .

(c)a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this

Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your appellant, Gerald W. Emerson, by Counsel, respectfully submits as follows:

STATEMENT OF THE CASE

Mr. Emerson, brought this case by filing a Petition for Writ of Certiorari, At Law No. 154173, in the Circuit Court of Fairfax County for review and reversal or remand of the June 25, 1996 effective decision of the BZA of Fairfax County the case should not be continued for hearing by the full of member board and that Mr. Emerson's use of his property was not a lawful nonconforming use. The vote had been 3 - 2 in favor of Mr. Emerson, but was in effect against him because Section 15.2-2312 of the Virginia Code Ann. required a vote of "not less than a majority of all the members of the board.". The Zoning Administrator of Fairfax County subsequently filed an enforcement suit against Mr. Emerson, In Chancery No. 147685. These matters were consolidated for trial. A hearing was held before the Honorable Leslie

M. Alden, Judge for Fairfax County Circuit Court, on September 17, 1997. On February 13, 1998, a decree was entered affirming the decision of the BZA and granting the injunction sought by the Zoning Administrator, which decree was amended March 5, 1998 *nunc pro tunc* to February 13, 1998. Plaintiff filed a Notice of Appeal from said decree to the Supreme Court of Virginia, inter alia, on the grounds that the denial of a hearing before the full seven (7) members was a violation of the V and XIV of the United States Constitution on March 12, 1998. The Supreme Court of Virginia refused the petition for appeal on August 21, 1998.

ASSIGNMENT OF ERROR

Under Amendment Fourteen of the United States Constitution, the BZA hearing should have been continued to a date when the entire seven (7) member Board was present to hear and decide the matter. The BZA and the trial Court were plainly wrong and in violation of the purpose and intent of the Zoning Ordinance by refusing to continue the hearing before the BZA to a date when the full seven (7) member board was present and in refusing to

overturn the BZA or remand the case to the BZA because it had not continued the case until the full seven (7) member board could be present.

The use of land involved had been ongoing for over forty (40) years. The first complaint ever filed was that filed in this case. The overwhelming majority of neighbors appeared to speak in favor of petitioner's continued use. Because of petitioner's chronic medical condition he cannot get work away from his home, and the use involved is his sole source of income.

QUESTION PRESENTED

I. Under Amendment Fourteen of the United States Constitution, the BZA hearing should have been continued to a date when the entire seven (7) member Board was present to hear and decide the matter.

STATEMENT OF FACTS

Mr. Emerson and his father before him have done auto repair at 8633 Plymouth Road since 1949. Auto repair has been done over that time period in both the open air and in the garage. There is no

evidence as to whether or not vehicle repair was conducted on the property prior to 1949. Mr. Emerson used to do vehicle repair on a part-time basis, but after leaving his former job in 1988 due to a chronic illness, his sole source of income has been from vehicle repair at his home. There have never been any signs or advertisements indicating any commercial activity on the premises. More importantly, there have been no complaints or citations concerning his use of the property since it began in 1949 other than the complaint that initiated this case.

A vast majority of the neighbors view Mr. Emerson's vehicle repair business to be an asset, not a nuisance, and are in full support of its continuation. They signed a petition, wrote letters on behalf of Mr. Emerson, and fifteen (15) of them were present to support him at the BZA hearing. Despite the overwhelming number of neighbors in support of Mr. Emerson, basically because of the complaint of one neighbor, who has since sold her house (see affidavit in support of motion to stay injunction pending proceeding before this court), the Zoning Administrator took the action that led to this appeal.

Another neighbor, who lives directly behind the Emerson's and now opposes the use, did not even know such activity was being conducted on the property until he received notice of the appeal to the Board of Zoning Appeals of Fairfax County (BZA).

At the BZA appeal, where Mr. Emerson's presentation was limited to ten minutes, because a majority vote of all seven Board members (i.e. four out of seven) was required to overturn the decision of the Zoning Administrator and only five members were present, a request was made for a deferral until the full complement of the Board could be present. The BZA refused to defer in this case. Mr. Emerson received the favorable vote of a majority of the members present (three out of the five voted to overturn the Zoning Administrator's ruling), but was effectively denied relief for lack of the fourth vote.

REASON FOR GRANTING THE WRIT

That the denial of a continuance requested to provide a fair chance for Appellant to gain the votes of four (4) members of a seven (7) member board rises to a constitutional due process denial

where the status quo has been ongoing for over forty years, there is no nuisance involved, and the denial of the continuance results in Appellant having to gain the votes of four (4) of the five(5) board members present. This point is underscored by the fact that Appellant gained the votes of three(3) of the five (5) members present.

There is a presumption that the BZA's decision was correct unless there is a showing that they were clearly wrong. The BZA was in favor of Mr. Emerson's request to overturn the decision of the Zoning Administrator on a vote of 3-2. However, given that the statute (Section 15.2-2312 of the Va. Code Ann.) requires four (4) votes from the seven (7) members of the BZA to overturn a decision of the Zoning Administrator, and only five(5) members were present, Mr. Emerson did not prevail. Moreover, the law requires that the two(2) who voted against his case be presumed to be correct (see *Board of Zoning Appeals v. University Square Assoc.*, 246 Va. 290, 295; 435 S.E.2d 385, 388 (1993)). He won, but he lost. Under the circumstances of this case, he is being denied justice by the

requirement that he receive a majority of the votes of the full Board when the full Board did not hear his case.

A request was made for a continuance until a full complement of the Board could be present, but the request was denied. The BZA can and does continue hearings at its discretion. In this instance, the BZA was clearly wrong and denied Mr. Emerson his procedural due process rights guaranteed under Amendment XIV of the United States Constitution in not deferring or continuing the hearing. The purpose of the procedural due process guarantee is to provide procedural safeguards against the government's arbitrary deprivation of certain interests. *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989). Furthermore, procedural due process by way of fullness of opportunity is important in a land use case. *DSA Marine Sales & Service Inc. v. County of Manatee*, 661 So. 2d 907 (Fla. Dist. Ct. App. 1995). This is especially true in a case where an individual's livelihood and basic rights to use their property are at stake.

The use in this case has been ongoing for over forty years.

There had been no complaints or citations until one neighbor complained. There was no imminent harm or danger posed by the continuation of this use until the entire complement of the Board was available for a hearing. However, there was a true and imminent harm to Mr. Emerson by the decision to be rendered by the BZA - the loss of his sole source of income.

To evaluate the unfairness of petitioner's circumstances, the Court has given us an analysis by which to measure and weigh specific factors. These factors must be weighed in determining what process is due an individual subject to a deprivation. *Walters v. Nat'l Assn of Radiation Survivors*, 473 US 305, 87 L Ed 220, 105 S Ct 3180 (1985).

That analysis was laid out in *Mathews v. Elridge*, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976). First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Petitioner's interest is, in short, his very livelihood. He earns his living working from his home. Certain medical conditions prevent him from earning his living in any other manner.

The procedural safeguards of which Petitioner wished to avail himself was a decision by the full BZA. The importance of having the full board hear his side of the story is heavily weighed upon by the seriousness of his interest. Petitioner wanted to continue his hearing until the full board could meet. A continuance of a hearing is an action after is granted as a matter of course.

Gathering the full board might have taken time and may have caused inconvenience to its participants. But, it cannot be said that such a hearing, with the full board present, would have burdened the government's administrative and fiscal interests any more than when it does grant continuances as a matter of course in any other case.

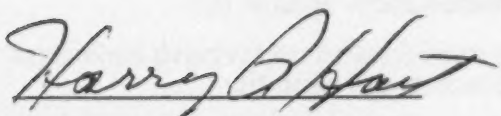
Weighing the Petitioner's circumstances against the additional administrative and fiscal burdens put upon the

government, it is not unreasonable to have granted petitioner the continuance he sought. Just as a decision made based on lack of information cannot be binding as a matter of fundamental fairness and due process, *Covington v. Dept. of Health & Human Serv.*, 750 F.2d 937, 943 (Fed. Cir 1984), neither can a decision made with lack of a full board under the circumstances of this case.

CONCLUSION

For the foregoing reasons, we respectfully petition this Court to grant our petition for writ of certiorari, to hear the case on the issues presented, and reverse the decree of the Circuit Court and the effective decision of the BZA. In the alternative, plaintiff respectfully prays that the Court order the remand of this case to the BZA for a hearing before, and decision by, the entire Board.

Respectfully submitted
Gerald W. Emerson
By Counsel



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